

**In the
Supreme Court of Missouri**

CODEY L. SMITH,

Respondent,

v.

STATE OF MISSOURI,

Appellant.

**Appeal from Barton County Circuit Court
Twenty-Eighth Judicial Circuit
The Honorable James R. Bickel, Judge**

APPELLANT'S SUBSTITUTE REPLY BRIEF

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ARGUMENT

I.

The motion court erroneously based its judgment on grounds that were not pled in the Rule 29.15 motion.

Point I of the State's opening brief argued that the motion court clearly erred in granting the Rule 29.15 motion on grounds not pled in the Rule 29.15 motion, as the court discussed counsel's failure to investigate Kyle Carroll as a potential witness, while the motion only alleged that counsel was ineffective for failing to call Carroll, not for failure to investigate. (PCR L.F. 10-11, 13, 45-47). Smith responds that the discussion about counsel's failure to investigate occurred within the context of whether the decision not to call Carroll was a reasonable trial strategy, so that the court's finding does fall within the scope of the Rule 29.15 motion.

Smith's argument is limited to the court's written findings and does not take into account the verbal findings made at the conclusion of the evidentiary hearing, when the court announced it was ruling in favor of Smith. The State's opening brief discusses those verbal findings and how they show that the court treated the failure to call the witness and the failure to investigate as separate claims, and the State stands on that argument.

II.

Trial counsel made a reasonable strategic decision not to call Kyle Carroll as a witness.

Smith's argument that counsel could not make a reasonable decision not to call Carroll as a witness without first talking to him has been addressed in the State's opening brief. The State stands on that argument.

Smith also argues that counsel's decision not to call Carroll was unreasonable based on the motion court's finding that Carroll was a credible witness at the evidentiary hearing. (PCR L.F. 45). But this is not a case where the motion court heard conflicting testimony and had to decide which version of events was credible. While not making a specific finding, the motion court clearly found counsel Fleischaker to also be a credible witness, as evidenced by the court's acknowledgement after the evidentiary hearing that the decision not to call Carroll as a witness would be a legitimate trial strategy because Carroll's testimony could have backfired on Appellant, no matter what he said. (PCR Tr. 66).

As noted in the State's opening brief, Fleischaker knew that Carroll could either get on the stand and implicate Appellant in the robbery, or he could testify that Appellant was not involved. But Fleischaker realized that even if Carroll testified to the latter, he was subject to impeachment with the

letter he had written to the prosecutor offering to give over his accomplice in exchange for a sentence reduction. Fleischaker's concern was whether the jury would find Carroll to be a credible witness once it heard about the letter and about the fact that he did not get the deal he was seeking, thus giving him a motive to get on the stand and harm the State's case. The fact that the motion court found Carroll to be a credible witness at the Rule 29.15 hearing has no bearing on whether Fleischaker's trial strategy was reasonable.

The court's credibility finding also does not change the fact that counsel's strategic decisions must be evaluated based on counsel's perspective at the time that the decision is made. *Strickland v. Washington*, 466 U.S. 668, 689 (1984). Even if counsel had talked to Carroll before trial and Carroll had said he would exonerate Smith, counsel could not be sure that Carroll would keep that promise. And the fact that Carroll had reached out to the prosecutor to offer to help convict his co-actor in the robbery would have given counsel ample reason not to trust Carroll. Faced with the possibility that Carroll might go back on his word and implicate Smith, counsel could reasonably conclude that keeping Carroll out of the case was the safest course of action.

The motion court clearly erred in finding counsel ineffective. The judgment granting the Rule 29.15 motion should be reversed.

CONCLUSION

In view of the foregoing, Appellant submits that the judgment of the motion court should be reversed and that Respondent's motion for post-conviction relief under Rule 29.15 should be denied.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I hereby certify:

1. That the attached brief complies with the limitations contained in Supreme Court Rule 84.06, and contains 761 words as calculated pursuant to the requirements of Supreme Court Rule 84.06, as determined by Microsoft Word 2007 software; and
2. That a copy of this notification was sent through the eFiling system on this 20th day of March, 2012, to:

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